

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

PK-II
29791**FILE:**

B-214997

DATE: November 15, 1984**MATTER OF:**

Automatics Limited

DIGEST:

A bid received on a total small business set-aside solicitation that failed to indicate that the bidder is either a manufacturer or regular dealer and does not commit the bidder to furnish supplies manufactured by a small business is nonresponsive and may not be accepted. Bidder's failure to assume obligation to provide product manufactured by a small business is not overcome by completion of the production and shipping point clause, because that clause establishes only a present intent to manufacture the product.

Automatics Limited protests the rejection of the bid it submitted in response to invitation for bids (IFB) DAAA09-84-B-0233 issued by the Department of the Army for unmounted magnetic compasses. The IFB was issued as a total small business set-aside; Automatics submitted the apparent low bid. However, Automatics failed to certify in its bid that it was a small business or that it was the manufacturer of the supplies. The Army rejected the bid because it was unable to determine on the face of the bid that Automatics was agreeing to furnish a product manufactured by a small business. We deny the protest.

According to Automatics, it should have been awarded the contract. Automatics says the contracting officer should have considered evidence outside its bid to determine that Automatics was a small business. It says the Army knows it is a small business manufacturer because it has manufactured compasses for the Army under a number of prior contracts. Automatics further says it properly completed the IFB performance and shipping point clause, thus indicating its intent to perform the contract at its facilities in Denver, Colorado. Since the Army should have known that it was a small business, the protester contends the Army should have concluded that it was offering a

030561

product to be produced by a small business and should have treated the failure to check the appropriate boxes as a minor deviation.

The IFB clauses at the center of the dispute require that the offeror represent that:

"He () is, () is not, a small business concern. If offeror is a small business concern and is not the manufacturer of the supplies offered, he also represents that all supplies to be furnished hereunder () will, () will not, be manufactured or produced by a small business concern in the United States, its possessions, or Puerto Rico."

and

"He is a () regular dealer in () manufacturer of, the supplies offered."

Automatics did not complete either certification. In the small business certification clause, the bidder must first represent whether it is itself a small business concern, a matter that we have previously held is not a matter of responsiveness because the accuracy of that representation may be decided after bid opening by the Small Business Administration on the basis of information outside the bid. Jimmy's Appliance, 61 Comp. Gen. 444 (1982), 82-1 CPD ¶ 542.

The second portion of the clause, however, does concern a matter of responsiveness because it involves an obligation to provide supplies manufactured by a small business concern, a key element of a small business set-aside for supplies. If a bid on a small business set-aside fails to establish the legal obligation of the bidder to furnish supplies manufactured or produced by a small business, the bid is nonresponsive and must be rejected. Mechanical Mirror Works, Inc., B-210750.2, Oct. 20, 1983, 83-2 CPD ¶ 467. In other words, to be responsive to a solicitation for supplies in a small business set-aside, there must be an enforceable legal obligation created in the bid that the bidder, if awarded the contract, will furnish supplies manufactured by a small business. Otherwise, the government's acceptance of the bid would not

legally obligate the contractor to furnish small business products consistent with the set-aside. See Cascade Pacific International, B-208149, Aug. 3, 1982, 82-2 CPD ¶ 106.

Automatics argues that its obligation was evident from its completion of section K-10 of the solicitation which, as completed, read in part as follows:

"PLACE OF CONTRACT PERFORMANCE AND SHIPPING POINT

"The offeror is to fill in (a) below, the intended place of performance, including the street address of any contract resulting from this solicitation. Should the offeror not be the owner or operator of these facilities, he shall fill in the name of the owner or operator in (b) below:

"(a) Place of Performance	Shipped from:
Automatics Limited	Automatics Limited
2050 S. Pecos Street	2050 S. Pecos Street
Denver, CO 80223	Denver, CO 80223"

We agree with Automatics that the responsiveness of a bid must be determined by reading the bid as a whole. Insofar as the small business certification clause in this case is concerned, a bid should be viewed as responsive if somewhere in it the bidder has indicated its intent to manufacture the compasses. We further agree that it is necessary only that the firm establish in its bid an obligation to perform sufficient, substantial, production-like functions since, as we have recently pointed out, it is not necessary for purposes of size status that the firm perform the majority of the work on a particular contract, provided it coordinates suppliers and performs other functions that are closely related to the production process. Surgical Instrument Company of America, B-215931, Aug. 28, 1984, 84-2 CPD ¶ 233.

We do not agree, however, that above cited place of performance provision establishes the firm, enforceable commitment required that Automatics, as a small business, will in fact manufacture the supplies. Automatics' failure

to certify itself as the manufacturer of the supplies leaves it free to supply a manufactured product from another source if it chooses to do so. Had Automatics represented itself as the manufacturer, its bid would have been responsive as its size status could have been confirmed after bid opening. See Jack Young Associates, Inc., B-195531, Sept. 20, 1979, 79-2 CPD ¶ 207. In our view, the place of performance clause only expresses a present intent to provide the principal producing facility. The purpose of the clause is informational and relates to bidder responsibility rather than to responsiveness. Keco Industries, Inc., B-199934, Sept. 22, 1980, 80-2 CPD ¶ 219. As the Keco case suggests, a firm is not necessarily precluded from changing its designated point of production to enhance its ability to perform. Since an offeror may change its proposed place of performance after bid opening, Automatics cannot be said to have assumed an obligation to furnish a small business manufactured product merely by virtue of the point of production clause.

Accordingly, the protest is denied.

Milton J. Auster
for Comptroller General
of the United States